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No. 83-1912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK M. REED, JR.,

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS ADDRESSED IN REPLY

1. This Petition should be consolidated with *Francis v. Franklin* (No. 83-1590) now pending before this Court, which raises similar issues.

2. The failure to require proof of the contested statutory element of "explosives" cannot be harmless.

3. The refusal to permit direct evidence, cross-examination and discovery denied Petitioner his right to prove who really committed the crime.

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I. THIS PETITION SHOULD BE CONSOLIDATED WITH FRANCIS V. FRANKLIN (NO. 83-1590) NOW PENDING WHICH RAISES SIMILAR ISSUES

This Court should grant this Petition since it has just granted *certiorari* from the Eleventh Circuit in *Francis v. Franklin*, 720 F.2d 1206 (11th Cir. 1983) (no. 83-1590). In *Francis v. Franklin*, this Court will decide whether under *Chapman v. California*, 386 U.S. 18 (1962), it can ever be harmless to create an impermissible presumption on a contested element such as intent.

The scope of *Chapman v. California*, *supra*, was left open in *Connecticut v. Johnson*, 460 U.S. 73 (1983). *Connecticut v. Johnson*, in a plurality decision, ruled that an error as to an element cannot be "harmless" where contested, but left open the question of when automatic reversal might be appropriate. The identical issue was again left unresolved by a plurality in *Koehler v. Engle*, 707 F.2d 241 (6th Cir. 1983), *cert. granted*, _____ U.S. _____, 104 S.Ct. 241 (1983). The recent granting of *cert.*, in *Francis v. Franklin*, *supra*, demonstrates the questions left unanswered by *Connecticut v. Johnson* and *Koehler v. Engle* are important issues which must be clarified.

The present case of *U.S. v. Reed* presents an almost identical issue to that now presented in *Francis v. Franklin*. While *Francis v. Franklin*, *supra*, involves an impermissible burden shift on the element of "intent," *U.S. v. Reed* presents the parallel question of an impermissible presumption on a contested *statutory* element. The Supreme Court should resolve *Francis v. Franklin* with a full understanding of its impact in the parallel situation presented in *U.S. v. Reed*.[1]

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[1] In *Francis v. Franklin*, 720 F.2d 1206 (11th Cir. 1983) the Eleventh Circuit found the error not harmless no matter which test was applied. Thus *Francis v. Franklin* may not reach the question of when automatic reversal is required. In *U.S. v. Reed*, however, the Ninth Circuit conceded the jury instruction failed to require an "explosive" as mandated by statute, yet applied the "harmless error doctrine" even though it was established by the Government's own witnesses that the gasoline in the cans could not "explode." *U.S. v. Reed* thus presents a clear context to resolve the issues left open in *Connecticut v. Johnson*.

The trial court in *U.S. v. Reed* created a conclusive presumption by ordering the jury to convict based on proof of a "fire" in spite of the fact that the statute requires the element of an "explosive." The fact that the Ninth Circuit recognized the egregious nature of this error, yet still found "harmless error" emphasizes the confusion which still exists under the harmless error doctrine of *Chapman v. California, supra*, as it applies to errors concerning contested statutory elements. If it can be "harmless" to fail to instruct the jury on a contested statutory element, then the harmless error doctrine of *Chapman, supra*, would render meaningless the due process requirement that the Government prove each element of its case.

Petitioner's opening brief cites cases illustrative of the split in the circuits under *Chapman v. California* and *Connecticut v. Johnson, supra*.[2] Contrary to the Government's arguments, the confusion in the above cases goes well beyond application of the harmless error doctrine to the element of "intent." For example, in *U.S. v. Johnson*, the Fifth Circuit held that harmless error could never apply to a failure to instruct on a contested *statutory* element of a "security." Additional cases show that the conflict amongst the circuits continues both as to the elements of intent and contested statutory elements. *U.S. vs. Herbert*, 698 F.2d 981 (9th Cir. 1983); *Petition of Hamilton*, 721 F.2d 1189 (9th Cir. 1983); *Francis v. Franklin, 720 F.2d 1206 (11th Cir. 1983); Williams v. Engle*, 559 F.Supp. 395 (N.D. Ohio 1983); *Lannon v. Hogan*, 719 F.2d 518 (5th Cir.

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[2] See discussion in opening petition of *U.S. v. Crowder*, 719 F.2d at 166, 177, (6th Cir. 1983); *Koehler v. Engle*, 707 F.2d 241, 246 (6th Cir. 1983) (*cert. granted* and *aff'd* _____ U.S. _____, 104 S. Ct. 241 (1983); *Conway v. Anderson*, 698 F.2d 282, 285 (6th Cir. 1983); *U.S. v. Johnson*, 718 F.2d 1317 (5th Cir. 1983).

1984); *Spencer v. Zant*, 715 F.2d 1562 (8th Cir. 1983).[3]

The Ninth Circuit itself has recently conflicted with the panel in *U.S. v. Reed*. In *Petition of Hamilton*, 721 F.2d 1189 (9th Cir. 1983), a different Ninth Circuit panel noted the confusion arising from *Connecticut v. Johnson*, *supra*, and *Koehler v. Engle*, *supra*. The Ninth Circuit in *Hamilton* did not follow the route of *U.S. v. Reed* and chose instead to follow the rationale of the Sixth Circuit in *Koehler v. Engle*, *supra*, holding:

> If a criminal defendant's intent is a disputed issue at trial, the reviewing court cannot rationally conclude beyond a reasonable doubt that an unconstitutional *Sandstrom* instruction given to a jury did not taint its verdict even if substantial evidence of intent exists. *Id.*, at 1191.

In *U.S. v. Herbert*, *supra*, yet another Ninth Circuit panel conflicted with *U.S. v. Reed*. The trial court failed to properly instruct on the statutory element that the defendants had to act "knowingly." The Ninth Circuit panel in *Herbert*, *supra*, found the failure to instruct on an element could not be harmless as to a co-defendant who contested "knowledge."

There is no way to reconcile *U.S. v. Reed* with the above decisions. The Ninth Circuit panel in *U.S. vs. Reed* conceded that an "explosive" was a requirement for federal jurisdiction. The failure to require an "explosion" and the instruction that

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[3]In *U.S. v. Herbert*, *supra*, another Ninth Circuit panel viewed a failure to instruct the jury on a *statutory* element of "knowledge," and refused to apply harmless error to one co-defendant since his knowledge was contested. In *Petition of Hamilton*, *supra*, the Ninth Circuit conflicted with the panel in *U.S. v. Reed* as to when automatic reversal is required under *Connecticut v. Johnson*. In *Lannon v. Hogan*, *supra*, the First Circuit noted they "need not broach the question of whether a *Sandstrom* error would require automatic reversal," under *Connecticut v. Johnson*. *Id.*, at n. 4. In *Francis v. Franklin*, the Eleventh Circuit found a *Sandstrom* error required reversal when intent was an issue. 720 F.2d at 1212. In *Williams v. Engle*, the Court held a *Sandstrom* error could only be harmless in "rare exceptions." 559 F.Supp. at 400. In *Spencer v. Zant*, *supra*, the Eleventh Circuit noted confusion since *Connecticut v. Johnson* was a plurality decision. 715 F.2d at 1578.

a "fire" sufficed created an irrebuttable presumption on a contested jurisdictional element, exactly as the instruction now before this court in *Francis v. Franklin* created an impermissible presumption on the contested element of intent.

In the years following *Chapman v. California*, *supra*, there remains confusion in the circuits, as to whether harmless error can be found when an instruction erroneously defines a contested element. Given the interrelation between *U.S. v. Reed* and *Francis v. Franklin*, the cases should be consolidated. The confusion following *Chapman v. California* should be resolved in a manner which puts to rest continued litigation on the harmless error rule. From the two cases of *U.S. v. Reed* and *Francis v. Franklin* this court should forge clear standards as to the scope of the harmless error doctrine.

II. THE FAILURE TO REQUIRE PROOF OF AN EXPLOSIVE CANNOT BE HARMLESS

The Government concedes the trial court directed the jury to convict based on evidence of a "fire," even though the statute requires proof of an explosive. The Government does not contest the substantial law in Petitioner's opening brief which holds it is for the *jury* to decide if there was proof of an explosive. Moreover, the Government does not dispute that the evidence established by the Government's own expert witnesses shows the gas-filled 7-Up cans could not explode.

The Government, however, claims another instruction requires proof of an explosive and cures the error. (Government's Brief at 6-7.) This instruction, however, could not have been relied upon by the jury. It is *undisputed* that the gas-filled 7-Up cans could not explode. There was no evidence to permit the jury to find the "explosive" under the inconsistent instruction the Government relies upon. The jury must have relied upon the erroneous instruction which only required proof of a fire.

Even if the separate instruction required proof of an explosive, that instruction would conflict with the more specific instruction that an "incendiary device" is anything capable of generating "fire." There is no way to speculate which of the

inconsistent instructions the jury followed. Inconsistent instructions did not compensate for the errors in *Connecticut v. Johnson*, *supra*, or *Koehler v. Engle*, *supra*. As stated in *Connecticut v. Johnson*, *supra:*

> The pivotal concept of *Sandstrom* is that the *possibility* that the jury reached its decision in an impermissible manner requires reversal even though the jury may also have reached the same result in a constitutionally acceptable fashion. *Id.*, at n. 13.[4]

Furthermore, the separate instruction relied upon by the Government does not require proof of an explosive. The instruction gives a detailed list of explosives but that list includes "incendiary devices." The general instruction relied upon by the Government nowhere defines "incendiary devices." The more specific and objected to instruction erroneously told the jury that "incendiary devices" meant those which generate a "fire."

The Government argues that the court of appeals found the 7-Up cans were "similar devices" under 18 U.S.C. 232(5). However, it is not clear that the *jury* found the 7-Up cans were "similar" to explosives and the overbroad definition of "incendiary devices" directed the jury to not even consider "similarity" once they found proof of a "fire." The jury could not have found the gas-filled containers were similar to explosives, given the only evidence established the cans could not explode. Circuit law establishes that "similar devices" under 232(5) refers to devices which also *explode*. See, *U.S. v. Gere*, 662 F.2d 1291, at 1296 (9th Cir. 1981).

Contrary to the Government's assertion, Petitioner repeatedly contested the issue of explosives. During the Government's case, the Petitioner cross-examined the Government's

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[4]In *Connecticut v. Johnson*, and *Koehler v. Engle*, the jury was correctly informed that intent was an element of the Government's case and that all elements must be proved by the Government beyond a reasonable doubt. This accurate general instruction did not save the more specific and inconsistent instruction which created a presumption of intent. *Francis v. Franklin*, 720 F.2d 1206 (11th Cir. 1983) at 1211.

experts and established uncontested proof that the cans could not explode. (Opening brief of Petitioner at pages 8-9.) Following the Government's case, Petitioner moved for a judgment of acquittal, and in a 20-page motion and oral argument, argued there was no proof of an explosive as required by statute. (Docket 41-63.) Following the defense case, Petitioner *again* objected to the jury instructions both in writing and orally noting they permitted conviction based solely on a finding of fire. The trial court, however, rejected all authority and all arguments and instructed that a "fire" sufficed. To the extent Petitioner did not argue the lack of "explosives" to the jury, it was only because the erroneous instructions prohibited such an argument. The erroneous instructions not only directed the verdict, but *prohibited* the defense from arguing to the jury on a contested statutory element. Petitioner's defense that he did not hire the arsonist was totally consistent with the defense that there was no proof of an explosive.

The cases cited by the Government support Petitioner. In *U.S. v. Herbert*, *supra*, the Ninth Circuit reversed based on the failure of the court to instruct on the statutory element of "knowledge" as to the co-defendant who contested that element. In *U.S. v. Koessler*, 731 F.2d 1509, 1518 (11th Cir. 1984), the Eleventh Circuit found harmless error on a statutory element (value of stolen property) but only because the value was uncontested. *Id.*, at 1518. Unlike the above cases, the element of "explosives" *was* contested.

The Government argues that *Connecticut v. Johnson* applies only to the element of intent. It is equally offensive, however, to create an irrebuttable presumption which removes the Government's duty to prove a contested statutory element. The argument by the Government and finding by the appellate court that it is permissible to create an irrebuttable presumption on a statutory element underscores the need for this court to extend the rationale of *Connecticut v. Johnson* to statutory elements.

Finally, the Government argues the statute has been amended to now include arsonists. The issue in this petition, however, is not whether arson should be a state or federal crime.

The issue is whether the harmless error doctrine should be construed so broadly as to permit a trial court to direct a verdict against a defendant by eliminating a contested statutory element. This court should grant this petition and establish standards which prohibit such a broad and unconstitutional application of the harmless error doctrine.

III. THE REFUSAL TO PERMIT DISCOVERY, CROSS-EXAMINATION OR DIRECT EVIDENCE DENIED THE FUNDAMENTAL RIGHT TO PROVE WHO REALLY COMMITTED THE CRIME

The Government concedes a defendant may prove his theory of the case. *Davis v. Alaska*, 415 U.S. 308 (1983); *Brady v. Maryland*, 373 U.S. 82 (1963). The trial court prohibited discovery, cross-examination and direct evidence which would have proven that McDaniel and Greene (Petitioner's sole accusers) had an independent motive to burn McGee's Restaurant, or that if anybody hired them to do so, it was McGee's Restaurant.

The Government cites the appellate decision for a factual statement. However, these facts come only from the testimony of McDaniel and Greene, who pointed at Petitioner Reed only after being offered considerable leniency if they convicted someone. Hence, the need to fully cross-examine McDaniel and Greene was crucial to a fair trail.

The Government argues there was not a sufficient basis established to justify discovery, cross-examination or direct evidence of the defense theory. No "showing" is required to present the defense theory or to cross-examine the Government's accusers. Even if a "showing" was required, it was clearly made.

Petitioner, in oral argument and by written motions, made a detailed offer that the arson reports established McDaniel's and Greene's prior history of arsons. (*See*. Docket 182, and offer set out in Appendix III to opening petition.) In two separate motions, Petitioner specified instances where McDaniel and Greene were suspected in contemporaneous arsons. McDaniel made statements recorded without his knowledge indicating a

history of arsons to obtain the insurance proceeds from doing electrical work. McDaniel claimed he would "rip off the insurance company again." Municipal fire investigator Lodwig conceded in a pretrial deposition that Greene and McDaniel were named suspects in the arson reports. For example, as noted in the opening petition, both McDaniel and Greene were suspects in the Wild Cherry Bar arson. Greene was the bartender while McDaniel obtained the insurance proceeds to do the electrical work. Investigator Lodwig admitted there were no ongoing investigations which would be jeopardized by granting discovery.

A detailed offer of proof was also made to discover case agent Tarrington's report. Both McDaniel and Greene, while taped without their knowledge, stated it was McGee's Restaurant, not Petitioner, who paid for the arson. Case agent Tarrington testified before the grand jury that he had discovered evidence indicating the "possibility the owners of McGee's (Restaurant) who wanted their own restaurant burned..." (Grand jury, page 4, Docket excerpt at 160-163.] Thus it was logical to move for Investigator Tarrington's report. An examination of Appendix III to the opening petition, as well as Docket 182 establishes that the trial court was fully informed of the above in great detail. Given that neither the Municipality or Investigator Tarrington suggested any ongoing investigation would be jeopardized, the above showing was sufficient.

The Government claims that Petitioner was permitted to develop the defense through cross-examination of McDaniel, Greene and Tarrington. The defense, however, was permitted only limited cross-examination without the above crucial discovery. The arson reports would have permitted the defense to investigate and discover details of McDaniel's and Greene's *modus operandi* to confront them with during cross-examination.

More importantly, the limited cross-examination was not sufficient since McDaniel, Greene and case investigator Tarrington *denied* prior arsons or the possibility that McGee's Restaurant burned themselves out. McDaniel and Greene both denied prior arsons. McDaniel denied burning McGee's to "rip

off the insurance companies again," or that McGee's Restaurant paid them for the arson. Investigator Tarrington denied any knowledge that McGee's Restaurant had burned themselves out, and claimed at trail he had no evidence "direct or indirect" which suggested that McGee's burned themselves out. (Tr. II-— 1092-1094.)

A defendant is not limited under due process to cross-examining the Government's case. Petitioner had the right to place before the jury his *own* evidence. The trial court, in a written decision, not only denied discovery but furthermore held prior arsons "collateral" and irrelevant, thus precluding Petitioner from proving McDaniel and Greene burned McGee's as part of an ongoing scheme, or that McGee's burned themselves out.

The Government argues that the reports are not admissible. The issue is not admissibility, but whether discovery would lead to admissible evidence. The arson reports would have permitted a full discovery of witnesses and physical evidence that would establish McDaniel's and Greene's independent motives for the arson. Similarly, discovery of Agent Tarrington's reports would have permitted discovery of proof that McGee's faltering business led them to hire the arsonists to collect the insurance.

The Government relies on the *in camera* review of the trial court and appellate court. However, as the United States Supreme Court noted in *Alderman v. United States*, 394 U.S. 165 (1969):

> ...An apparently innocent phrase or chance remark...may have specific significance to one who knows the more intimate facts of an accused's life. And yet the information may be wholly colorless and devoid of meaning to one less acquainted... Unavoidably, this is a matter of judgment too great to rely wholly on the *in camera* judgment of the trial court. *Id.*, at 182.

The denial of discovery, meaningful cross-examination and direct evidence denied Petitioner his most basic right to prove who really committed the arson. *Davis v. Alaska*, *supra*; *Brady*

v. Maryland, supra. The trial court's rulings were inconsistent with the concept that both the prosecution and the defense receive an equal day in court.

CONCLUSION

This court should grant this petition, consolidate this case with *Francis v. Franklin, supra*, and forge clear standards as to the scope of the harmless error doctrine.

The erroneous instruction permitted conviction based purely on proof of a "fire" even though the statute requires an explosive. The failure to properly instruct on a contested statutory element created an irrebuttable presumption, which directed the verdict. Such an error can never be harmless, especially where the evidence uncontestedly established the containers could not explode. The erroneous instruction was the only basis for conviction.

The denial of discovery, cross-examination and the right to present direct evidence establishing that someone other than Petitioner was responsible for the arson denied Petitioner his most fundamental right to establish who committed the arson. This petition should be granted to permit a new and fair trial.

DATED this 5th day of September, 1984, at Anchorage, Alaska.

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